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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF APPELLANT, DR. MAXIMILIAN GOLDSTEIN

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DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF APPELLANT, DR. MAXIMILIAN GOLDSTEIN

Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of New York, before which Court the case was tried.

The Opinion of the Circuit Court of Appeals for the Second Circuit appears in the printed record (fols. 34-48)* and is reported in 120 Fed. (2d) 485.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 18, 1941 (fol. 49).

Jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended, U. S. C. Title 28, Section 347 (a) by a petition filed July 11, 1941. This Court granted certiorari on October 13, 1941 (fols. 50-51).

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* The printed portion of the Record is noted by folio references; the typewritten portion, by page numbers.

Questions Presented.

1. Whether the appellant, not being a party to the telephone communications intercepted (by "wiretapping") and divulged in violation of Section 605 of the Federal Communications Act, may complain of that violation.

2. Whether Section 605 of the Federal Communications Act prohibits the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone communications in advance of trial, as against appellants who were not parties to the communications.

3. Whether the District Court unduly limited the scope and conduct of the preliminary hearing, thus depriving the appellant of a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications rather than from independent sources.

4. Whether the Trial Court's instructions deprived the appellant of a fair trial by emphasizing the evidence of the prosecution and by indicating the Court's views on factual issues submitted to the jury.

Statutes Involved.

Section 605 of the Federal Communications Act (L. 1934, Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) provides as follows:

"§605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge

or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto*: Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934 c. 652, §605, 48 Stat. 1103.)" (Italics supplied.)

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures,* shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Italics supplied.)

Statement of the Case.

Preliminary Statement.

This appellant, with others, was indicted on thirty counts. Twenty-nine counts charge the use of the mails to defraud (U. S. C. C., Section 215, 18 U. S. C. Section 338) and the thirtieth count, conspiracy so to do (U. S. C. C. Section 37, 18 U. S. C. Section 88) (R. 6-75).

The alleged scheme charged was one to defraud insurance companies by causing various insureds to file with the insurance companies false claims for disability benefits, deceiving the companies into paying money to the insureds in the belief that the claimants were "permanently and totally disabled" by heart disease.

Defendant Elentuch was alleged to be a "chaser" in the employ of Garrow and Garrow, a firm of attorneys, who handled the prosecution of the claims. Defendant Rubin was alleged to be an insured who, with others, manufactured fictitious ailments, underwent fraudulent hospitalization and medicated himself with digitalis in order to affect electrocardiograms (often referred to as "EKGs"), in such a way as to indicate heart disease. Defendants Dr. Goldstein and Dr. Schwartz, with others, were alleged to have

coached claimants as to the history and symptoms of heart disease, and to have made fraudulent certifications and other fraudulent statements.

Ten defendants were named in the indictment. A severance was granted as to two defendants (R. 88). Joseph Garrow pleaded guilty before trial (R. 85). Another defendant pleaded guilty during trial (R. 88). The action proceeded to judgment against the remaining six defendants (R. 91).

The six defendants were convicted by the jury on various counts, with a recommendation of leniency. The four who received jail sentences have appealed. The convictions were affirmed by Circuit Court of Appeals, Second Circuit (fol. 49).

Proceedings Before the Trial.

In 1938 defendant Goldstein, together with one Joseph J. Weiss, and others, were tried for a similar crime. At the trial the Government introduced evidence of intrastate telephone conversations which had been intercepted by means of "wire tapping" carried out under the supervision of federal agents.

The defendants were convicted and their conviction affirmed by the Circuit Court of Appeals. *United States* v. *Weiss*, 103 Fed. (2d) 348 (C. C. A. 2, 1939). This Court reversed the conviction upon the ground that such evidence was inadmissible in view of the provisions of Section 605 of the Federal Communications Act. *Weiss* v. *United States*, 308 U. S. 321 (1940).

On the same day this Court decided *Nardone* v. *United States*, 308 U. S. 338 (1940), in which it held that Section 605 not only rendered the records of intercepted telephone communications inadmissible at the trial, but also forbade the use in advance of trial of such records for the purpose

of obtaining other evidence, or for any purpose whatsoever. This Court outlined the procedure for a preliminary hearing to be held in advance of trial to determine the extent to which the Government's evidence was the "fruit of the poisonous tree".

After the reversal of their conviction in the *Weiss* case, a new indictment was handed down against Weiss, Dr. Goldstein and others, and the case was moved for trial. At the opening of the trial the defendants, pursuant to the rule established by this Court in the *Nardone* case, applied to the Trial Court for the following relief:

(a) To suppress all records and transcripts of intercepted telephone messages.

(b) To suppress all evidence obtained by the Government by the use of such intercepted messages.

(c) To suppress the testimony of those witnesses whose testimony had been obtained in the first instance by the Government by the use of such messages.

(d) To suppress the testimony of those witnesses whose recollections had been refreshed or aided by such messages.

Upon application of the defendants (R. 108-112) a preliminary hearing was held before the District Judge to determine the extent to which the Government had made use of the forbidden "wire tap" evidence. The Court took testimony and rendered a decision. *U. S. v. Weiss*, 34 Fed. Supp. 99 (SDNY 1940). All the defendants in the *Weiss* case, except defendant Goldstein, thereupon pleaded guilty.

The Government did not proceed with the trial of the *Weiss* indictment against defendant Goldstein alone but

abandoned that case and moved the trial of the present indictment, known as the "Garrow indictment", to which defendant Goldstein was also a party. A similar motion and application was made by the defendants and a similar preliminary hearing was held before the same District Judge. By stipulation (R. 114-5) portions of the testimony taken at the *Weiss* preliminary hearing were read into evidence. Certain additional witnesses were also called. The nature of that testimony will be briefly summarized hereinafter.

Facts Developed At the Preliminary Hearing.

(a) *Investigation of the Case Prior to the Arrest of Defendants.*

In August 1936 Nahun A. Bernstein, an attorney, was retained by certain insurance companies to investigate alleged fraudulent disability claims (R. 167). He employed one Kipnis and one Friedman as informers (R. 214, 230). Kipnis had previously admitted orally that he had filed false disability claims (R. 234).

A dictaphone was installed at the place of business of these men, and various persons implicated in the scheme were invited to the premises so that they might be entrapped into admitting their complicity. The conversations of these people at the premises were overheard by means of the dictaphone and were recorded (R. 183-4, 194, 198). These conversations were referred to in the testimony as "room conversations" to distinguish them from telephone conversations.

In addition to eavesdropping on these room conversations by means of dictaphones, telephone communications to and from the premises were also overheard by means of listening over an extension telephone wire (R. 183-4). The telephone conversations so intercepted were also recorded (R. 183,

186-7) and stenographic transcripts were prepared (R. 264).

Mr. Bernstein received the records of both types of conversations and discussed them with the informers (R. 206-13; 214-15).

Finally (R. 280) Kipnis prepared an unsigned written confession of some 52 pages (Govt's Ex. 5). Bernstein then laid before the United States Attorney the evidence which he had collected, consisting of the confession and the records of the intercepted room conversations and telephone conversations. The United States Attorney assigned a postal inspector to continue the investigation (R. 117). After nine days he rendered a report, dated December 6, 1936 (R. 153) which was based primarily upon the material which had been collected by Mr. Bernstein and upon the insurance company files (R. 122-3, 130, 157, 162, 164, 225-6, 278-9, 330-40, 463).

In the meantime representatives of the insurance companies continued to listen to telephone conversations by means of the extensions (Deft's Exs. C, I, J, K, L).

In January 1937 the United States Attorney decided to intercept telephone conversations on a larger scale by use of "taps" applied directly to a telephone wire rather than by eavesdropping over a telephone extension. Consequently, wire taps were placed on the telephones of Dr. Messman, of Garrow & Garrow, and upon both the home and office telephones of Joseph Weiss. By means of these taps Government agents intercepted all telephone messages passing over Dr. Messman's wire between January 29 and April 16, 1937, and again, from [redacted]y 6 through May 20, 1937 (R. 101). These conversations were recorded upon 240 discs or records and 200 stenographic transcripts thereof were prepared (R. 148). Similarly, the Government intercepted all messages passing over the wire of Garrow & Garrow between March 2 and March 5, 1937; from March 8 to April 16, 1937; and

from May 6 to May 20, 1937 (R. 101-2). These messages filled 670 records and 334 transcripts (R. 148). Similarly, the telephone wires of Joseph Weiss were tapped between March 7 and April 16, 1937, and from May 6 to June 30, 1937 (R. 781).

No other investigation was made of the case by the Government until after the arrests (R. 809). Many of the defendants were arrested in May 1937. Appellant Goldstein was arraigned in August 1937.

(b) ***Uses of the Intercepted Communications By the Government.***

Upon the preliminary hearing the witnesses, all of whom were hostile to defendants, attempted to minimize the importance of the "wire-tap" evidence. This position was in marked contrast to that taken by the Government prior to this Court's decision in the *Weiss* and *Nardone* cases. In a press release issued by the United States Attorney at the time of the arrests in May 1937 the Government had stated that "as a result of thousands of records of actual conversations, there is in the possession of the United States Attorney evidence which will lead to the prosecution of many more participants in these frauds" (R. 454-5, Deft's Ex. Y). Similarly, in his summation at the *Weiss* trial, the United States Attorney referred to the "wire-tap" evidence as the "crux" of the Government's case (R. 445-6).

The evidence adduced at the preliminary hearing revealed that the statements of the United States Attorney had been justified. It showed that the records of intercepted communications were used both to induce defendants to turn state's evidence and to refresh their recollection after they had pleaded guilty and agreed to testify for the Government. This was particularly true of Dr. Messman and Elias Gar-

row, the two chief witnesses for the Government at the trial.

The Dr. Messman who testified here is the same Dr. Messman who testified for the Government in the *Weiss* case. In its opinion in that case, this Court took occasion to refer to the circumstances under which Messman became a Government witness as follows (308 U. S. at 325):

> "It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonograph records and then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise."

This Court further stated, with reference to Messman (308 U. S. at 330):

> "Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence."

At the preliminary hearing in the case at bar, Messman was examined as to the circumstances under which he had decided to plead guilty. The record shows that upon his arrest in May 1937 he was brought before an Assistant United States Attorney (R. 428-35, 483-93) and that the latter said to him (R. 319) (Govt's Ex. BB for identification):

> "That is exactly what we want. I am telling you before we go any further that there is no use of us kidding each other. We have watched your telephone; we

have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on. We are not stabbing in the dark. *If you want to hear your voice on a record we will be glad to play it.* In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are considered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk." (Italics supplied.)

The record further shows that following this conversation Messman was put in a cell with other defendants, including one Benjamin Nelson. Nelson told him that he had been brought before the United States Attorney and that they had played a phonograph record of a telephone conversation in which he participated. They had also told him that this record was only a sample (R. 431). Nelson told Messman "They have an awful lot of evidence against us" (R. 431). After this conversation with Nelson, Messman saw the United States Attorney and decided to confess (R. 432, *et seq.*).

The prosecutor, John F. Dailey, who testified in the preliminary hearing, stated that Messman had been advised of the existence of the intercepted messages "either for the purpose of getting him to plead guilty or to get him committed to one set of answers in case he decided to go to trial" (R. 859).

In view of these facts, it is manifest that no reliance can be placed on Messman's statement at the preliminary hearing that his decision to plead guilty was not influenced by his knowledge of the existence of the incriminating tele-

phone conversations in which he had participated (R. 520). This is particularly apparent in view of the further facts that Messman was an admitted habitual and accomplished perjurer (R. 1263, 1265, 1271, 1300, 1301), and that he had been drawing a salary from the Government from the time of his arrest down to the date of his testimony in the case at bar (R. 967, 1278, *et seq.*).

With regard to Garrow, the evidence which appellants were able to adduce at the hearing was somewhat weaker. It did appear, however, that at the time Garrow pleaded guilty and decided to testify for the Government he knew of the existence of the intercepted messages (R. 335). He and his brother sat in the courtroom throughout the first *Weiss* trial where the "wiretaps" were introduced in evidence (R. 3032). It is also significant that his decision to plead guilty was made ten days after the Circuit Court of Appeals had held in the *Weiss* case, 103 F. (2) 348 (the decision later reversed by this Court), that intercepted intrastate telephone communications were admissible (R. 301-3).

Garrow, of course, denied that his decision to plead guilty had been in any way influenced by his knowledge of the fact that the Government possessed records of telephone conversations (R. 408, 418). We believe that the record makes it clear that this denial was not true. In the first place, Garrow's character was admittedly depraved in the extreme, so as to make his word of no value whatever (R. 2703-4, 2713-14, 2730, 2762-3, 2806, 2820, 2825, 3065). In the second place, throughout his testimony at the hearing he fenced with his examiner. He took refuge in the legalistic contention that he had no personal "knowledge" of the existence of the wire taps (R. 417), although he was compelled to admit that he "believed" that they existed (R. 415). The record is replete with convincing indications

that this "belief" was actually thorough knowledge (R. 405-19, 343, 344, 856). There can be no doubt, upon all the facts, that this knowledge played a large part in his decision to turn state's evidence.

In addition to using the records of intercepted conversations for the purpose of breaking down prospective witnesses, the Government used those records to refresh the recollections of the witnesses after they had decided to testify for the Government. The Assistant United States Attorneys were, of course, familiar with the contents of the conversations and had recourse to them in the preparation of the *Weiss* case (R. 351-2). They discussed the contents of the messages frequently with Messman (R. 357). The *Weiss* trial brief (Deft's Ex. H) which Messman prepared for the Government, indicated that throughout the course of his work he had resorted to the records of the wire taps in order to complete the pattern of his testimony (R. 510-13). The records were at all times available at the United States Attorney's office and constituted a storehouse of information for the use of the Government's agents in preparing witnesses (R. 488 *et seq.*; 501).

It is impossible, of course, to measure the exact extent to which Messman's mental operations prior to the trial were affected by the use of the forbidden material. It is impossible to distinguish that portion of the testimony which purported to be independent recollection from that portion which may be attributed to the record of a telephone communication. It would seem undeniable, however, that knowledge of the hundreds of such communications must have materially colored the witness' recollection and that his testimony must have been affected by that knowledge in no small degree.

Decision of the District Court.

At the conclusion of the preliminary hearing the District Court granted defendant's motion for the suppression of testimony only to the extent of suppressing the actual records of intercepted communications themselves (R. 613-15). The trial of the indictment then ensued. Appellant contended that Dr. Messman and Garrow were incompetent to testify upon the ground that (1) they had been induced to plead guilty and testify for the Government as a result of being confronted with the records of their intercepted telephone communications, and (2) their testimony had been strengthened and their recollections refreshed by the use of those records. The question of the competency of these witnesses was raised by appropriate objections and exceptions (R. 962, 2110, 5081-2). The District Court permitted both witnesses to testify.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held that the testimony of Messman and Garrow "was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either" (fol. 38); and further, that the District Court should have forbidden the prosecution to call Messman "and probably Garrow as well, though as to him we need make no finding," on the ground that the Government had failed to satisfy the burden which rested on it of proving that the confrontation of these witnesses with the records of the intercepted messages had no substantial part in influencing them to plead guilty and testify for the Government (fols. 40-41).

The Court affirmed the convictions, however, on the ground that petitioners had no right to complain of this use by the Government of the illegally intercepted telephone commu-

nications because petitioners were not parties to the communications thus used. The Court held that only persons who participate in conversations intercepted and divulged contrary to the provisions of Section 605 of the Communications Act have a standing to complain of the violation of that act.

As an alternative ground for its conclusion, the Circuit Court of Appeals held that the use to which the Government had put the intercepted communications in the case at bar did not violate Section 605. The Court held, despite the provisions of the fourth subdivision of Section 605, and despite the decision of this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1940), that Section 605 merely forbids a divulgence of an intercepted message upon the trial of the action, and that the statute does not prevent any use by the Government of an intercepted message which has been divulged prior to the trial, at least as against defendants who are not parties to the intercepted message (fol. 45).

Specification of Assigned Errors.

The questions raised were presented by appropriate assignments of error. They were:

1. Dr. Messman and Elias Garrow should not have been permitted to testify (R. 5241-2-4).

2. The appellant was unduly restricted in the preliminary hearing (R. 5237-41).

3. The charge was prejudicial (R. 5244-5).

SUMMARY OF POINTS RELIED UPON.

Point I—It was error to hold that because appellant Goldstein was not a party to the telephone communications intercepted in violation of Section 605 of the Federal Communications Act, he had no standing to complain of that violation.

A. The Court below improperly refused to follow the decision of this Court in *Weiss* v. *U. S.*, 308 U. S. 321 (1939).

B. The Circuit Court of Appeals improperly construed Section 605 as creating a privilege personal to the "Sender".

Point II—It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone conversations in advance of trial at least as against defendants who were not parties to the communications.

Point III—The Trial Court did not afford the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications and was not based on independent sources.

A. The prosecution failed to establish independent sources.

B. The Court restricted defendants in the preliminary inquiry.

Point IV—The Court's charge to the jury was prejudicial to the rights of the appellant.

POINT I.

It was error to hold that because appellant Goldstein was not a party to the telephone communications intercepted in violation of Section 605 of the Federal Communications Act, he had no standing to complain of that violation.

A. *The Court Below Improperly Refused to Follow the Decision of This Court in Weiss* v. *U. S.*, 308 U. S. 321 (1939).

The decision of this Court in the *Weiss* case is, in reality, a holding in favor of this appellant upon the question here at issue, although that question was not discussed in the Court's opinion. The record in the *Weiss* case clearly disclosed that Goldstein was neither a party to nor was mentioned in any of the intercepted telephone conversations which had been introduced in evidence. That fact was mentioned by the Circuit Court of Appeals in its opinion in the *Weiss* case (103 F. [2d] 348, 352) and was called to this Court's attention in the Government's brief (Brief of the U. S. No. 42, October Term, 1939, pp. 9, 40-41). It was important enough to be included in the reporter's summary of counsel's argument (308 U. S. at p. 323). This Court nevertheless reversed the conviction of Goldstein, as well as that of the other defendants, and in so doing necessarily held that Goldstein had a right to complain of the admission of the "wire-tap" evidence.

This Court's decision was so construed in a careful note on the *Weiss* case appearing in 53 *Harvard Law Review* 863, (1940) where it was stated (pp. 867-868):

> "The Court's interpretation of Section 605, however, would logically exclude from any proceeding, criminal or civil, evidence obtained by any interception, official or unofficial, of any conversation, *regardless of whether the defendant was a party thereto.*" (Italics supplied.)

In the case at bar the Circuit Court of Appeals recognized that this question was presented by the record in the *Weiss* case. Nevertheless, it held that it was not there decided. We believe that in thus dismissing the *Weiss* case from further consideration the Court below fell into error.

The mere fact that the point was not mentioned in the opinion of this Court in the *Weiss* case does not indicate that it was not considered and passed upon. Nor can it be assumed that this Court reversed Goldstein's conviction, along with that of the others, merely in order to avoid what, in the language of the Court below, would have been an "extremely harsh" result (fol. 41). This Court has not hesitated in the past to affirm the conviction of a defendant who was not prejudiced by the introduction of certain evidence, although at the same time reversing the conviction of other defendants who were prejudiced thereby. *Motes* v. *U. S.*, 178 U. S. 458 (1900).

Moreover, it may be noted that the Court below seems to have felt that an affirmance of Goldstein's conviction in the *Weiss* case would have been harsh, not as to Goldstein, but as to the other defendants, for it "would have presupposed that a fair trial of the defendants could have been had, although the forbidden records were actually introduced in evidence, provided that the jury had been admonished to use them only against Goldstein" (fol. 41). In other words, the Court below apparently believed that defendants against whom such evidence is inadmissible are prejudiced by the admission of that evidence as against another defendant. It is difficult to understand how the Court below, having this point of view, could have laid down the rule which it announced, for that rule will inevitably result in precisely this type of "harshness."

If records of intercepted telephone conversations, or other evidence obtained by their use, are to be admissible against defendants who were not parties to the conversation, de-

fendants who were parties will be as thoroughly prejudiced as though the evidence had been offered directly against them. This result is unavoidable, unless the rule is to be qualified so as to permit the introduction of the evidence against non-parties only in cases in which parties to the conversations are not also on trial. Such a solution would be illogical and impracticable, for the admission of evidence against a particular defendant may not be made to depend upon the identity of his co-defendants.

We believe it to be clear that the question here at issue was necessarily involved in the *Weiss* case, and that the reversal of Goldstein's conviction in that case can be explained only upon the theory that this Court attached no importance to the fact that Goldstein was not a party to the conversations and held that the evidence was as inadmissible against him as it was against the other defendants.

B. *The Circuit Court of Appeals Improperly Construed Section 605 as Creating a Privilege Personal to the "Sender".*

Assuming the question before it to be an open one, the Circuit Court of Appeals based its construction of Section 605 of the Federal Communications Act upon a supposed analogy with the rule that has obtained under the Fourth Amendment, that only the owner of property taken by an illegal search and seizure may object to its introduction into evidence at a criminal trial. This rule as to the Fourth Amendment has been laid down by various Circuit Courts of Appeal, but this Court has never passed upon that question. Much may be said in support of the thesis that the rule is unsound, and that it should be disapproved by this Court. Appellant Schwartz argues that proposition in his brief, and no purpose would be served by repeating that argument here. We believe that whatever may be the proper rule under the Fourth Amendment, the point of importance

is that the rule has no application to the wholly different problem presented by Section 605.[1]

In the first place, that rule is not directly applicable because wire-tapping does not constitute a violation of the Fourth Amendment. This Court so held in *Olmstead* v. *United States*, 277 U. S. 438 (1928), and when in *Weiss* v. *United States*, *supra*, appellants asked this Court to reconsider that decision, it found it unnecessary to do so.[2]

Consequently, the doctrine of the Fourth Amendment cases can be considered here only on the theory that Section 605 is so analogous to the Fourth Amendment that limitations on the latter must be equally deemed limitations on the former. The fallacy of that theory appears both from the contrast in the language of the two provisions and from the difference in their respective purposes.

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1 The decision of the Court below is critically analyzed in 55 *Harvard Law Review* 141 *et seq.* (1941).

It may be noted that the decision of the Court below is in conflict with another decision of the same Circuit Court of Appeals on the same question. In *U. S.* v. *Bernava*, 95 Fed. (2nd) 310 (C. C. A. 2nd 1938), the conviction of a defendant who was not a party to an illegally intercepted telephone communication was reversed. A contrary result was reached in *United States* v. *Seeman*, 115 Fed. (2nd) 371 (C. C. A. 2nd 1940). With the exception of Judge A. N. Hand, the judges who sat in the *Bernava* and *Seeman* cases were different.

2 On the authority of the *Olmstead* case, it has been held that evidence procured by wire-tapping may be introduced, despite an express statute making evidence obtained in violation of the Fourth Amendment inadmissible. *Hitzelberger* v. *State*, 174 Md. 152 (1938).

It may be noted that the opinion of the Court below, in discussing the Fourth Amendment, does not once mention the *Olmstead* case. Yet, in *Nardone* v. *U. S.*, 106 Fed. (2nd) 41 (C. C. A. 2nd 1939), *rev'd* 308 U. S. 338 (1939), in which the Circuit Court of Appeals held that Section 605 does not prohibit the employment of wire tapping as a means of obtaining clues and leads to other evidence, the Court relied on the *Olmstead* decision to distinguish the case at hand from the contrary rule prevailing under the Fourth Amendment. Thus, it would appear that the Circuit Court of Appeals asserts a similarity between Sections 605 and the Fourth Amendment, when to do so would result in a restricted interpretation of Section 605, and denies that similarity when its existence would result in a liberal interpretation of the section.

That Section 605 is broader in its terms than the Fourth Amendment, is apparent at first glance. Thus the Fourth Amendment forbids only "unreasonable" searches and seizures. The Federal Communications Act does not permit "reasonable" wire-tapping. Interception of telephone communications cannot be sanctioned by a warrant. Repeated efforts to restrict this Court's decision in *Nardone* v. *United States*, 302 U. S. 379 (1937), by permitting Government agents to engage in "reasonable" wire-tapping, have failed to receive Congressional approval.[3]

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3 In 1938 a bill was introduced to amend Section 605 so as to provide that "if the head of any executive department or independent establishment * * * reasonably believes that a violation of any criminal law the enforcement of which is under his supervision, may have occurred, may be occurring, or may be about to occur and makes certificate accordingly" this section should not apply to the investigation of such violation, or to the introduction of evidence procured as the result of such investigation (S. 3756, 75th Cong., 3rd Sess.). The bill passed both houses of Congress in slightly different form, but a final text was never agreed upon.

In 1940 the House passed a resolution authorizing and directing the Federal Bureau of Investigation "to conduct investigations to ascertain, prevent and frustrate any interference or attempts or plans to interfere with the national defense." This resolution provided that Section 605 should not apply to such investigation "if the Attorney General finds that there is probable cause to believe" that any violation of law in connection with national defense is taking place, has taken place, or may take place and so certifies. Evidence procured as a result of such investigation might be introduced in a criminal prosecution (H. J. Res. 571, 76th Cong. 3rd Sess.). The Senate, however, did not consider this resolution and it died in committee.

Two bills permitting limited wire-tapping were introduced in the current Congress (H. R. 2266 and H. R. 3099, 77th Cong., 1st Sess.) See: *The Hobbs and Walter Bills Compared*, 29 Georgetown L. J. 889 (1941). Both bills were superseded by a new one providing that notwithstanding the provisions of Section 605 "whenever the Attorney General * * * has reasonable ground for believing that a felony * * * relating to espionage, sabotage * * * the transportation of kidnapped persons * * * or the transmission of * * * extortion communications * * * may have been committed, is being committed, or may be about to be committed" * * * the Federal Bureau of Investigation may "intercept, listen in on, or record telephone, telegraph or radio communications." The evidence thus obtained "shall be admissible and admitted in evidence in any prosecution * * * if such evidence is otherwise admissible." (H. R. 4228, 77th Cong., 1st Sess.)

On June 30, 1941—*28 days after the decision below*—the House defeated this proposal (87 Cong. Rec. 5911).

There is another and more vital distinction between the Fourth Amendment and Section 605. The Amendment does not expressly forbid the *use* of evidence acquired in violation of its provisions. The statute, on the other hand, prohibits not only the acquisition of evidence by interception, but also its subsequent divulgence or use. Congress has said that "no person" shall divulge the contents of the intercepted communication to "any person", or "use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." This Court has interpreted this language to mean that the message shall not be divulged either in Court (*Nardone* v. *United States*, 302 U. S. 379 (1937)), or out of Court in advance of trial (*Nardone* v. *United States*, 308 U. S. 338 (1939)), whether the intercepted communication be interstate or intrastate in character (*Weiss* v. *United States*, 308 U. S. 321 (1939)).

There is, therefore, no room to interpret Section 605 as meaning that wire-tapped messages shall not be divulged on some occasions, but may be divulged on others, or that divulgence as against parties to the communication is forbidden, but as against those who are not parties is permitted. The statute creates no such distinction. It prohibits any divulgence or use whatever.

In its brief in opposition to the petition for a writ of certiorari, the Government argued (Br., p. 15) that the Fourth Amendment "as judicially construed" forbids "use", and that hence "there is no reason why a comparable statutory inhibition should require or be given more drastic sanction". This argument exemplifies the same fallacy as is to be found in the opinion below. The "statutory inhibition" of Section 605 in fact is not comparable to that of the Fourth Amendment. Consequently, the judicial construction to be given to the statute must necessarily be different from that which has been given to the Amendment.

Inasmuch as the Amendment does not expressly prohibit use, the lower Federal Courts have construed it as conferring a privilege only upon the owner of the property, which could not be availed of by a third person. Here, however, the broader language of the statute requires a broader interpretation.

Moreover, the interception of telephone communications is factually dissimilar from a search and seizure. In the one case tangible physical property is seized, and the owner either knows about, or can readily discover, its taking, while in the other an intangible conversation is intercepted, and no one is in a position to know if his telephone wires have been "tapped". Under the ruling of the Court below, a defendant is at the mercy of the prosecution to reveal whether or not his rights have been invaded. The likelihood of abuse, either through intention or inadvertence, is apparent. The instant case provides a striking example.

At the preliminary hearing the Government stipulated that 24 of the intercepted communications "have to do with" appellant Goldstein (R. 148). It was further stipulated that the foregoing tabulation included messages in which his name may have been mentioned "or" to which he was a party (R. 610). Appellant Goldstein's *locus standi* to complain of a violation of Section 605 was not raised or discussed in the District Court, and was not even questioned by the Government on the appeal to the Circuit Court of Appeals. Only after the decision of the Circuit Court of Appeals was it, for the first time, discovered that appellant Goldstein had actually been a party to at least eight of the intercepted messages, although that fact nowhere appeared in the Record.

The purpose of Section 605, as this Court has held (*Nardone* v. *United States*, 302 U. S. 379, 383 [1937]) is to prohibit employment by the Government of a particular method of obtaining evidence which is deemed "inconsistent with ethical standards and destructive of personal liberty." That purpose is broader than that of the Fourth Amendment.[4] It can be implemented only by enforcing the statute in accordance with its unequivocal terms. The construction adopted by the Court below, far from enforcing the will of Congress, in fact nullifies it.

If that decision stands, federal prosecutors may continue to "tap" telephone wires, secure in the knowledge that there will certainly be some defendant who will not be a party to an intercepted communication participated in by his co-defendants, and against whom a record of the conversation and all other evidence obtained through its use may be introduced. Indeed, where there are numerous defendants, as is usually the case in indictments of this character, it would be possible to introduce evidence obtained as the result of a conversation between defendants A and B against defendant C and thereafter to use as against defendant B an intercepted communication between defendants A and C, and so forth. Thus, all the wire-tapped messages could be thoroughly divulged to the jury, and yet the legislative prohibition would not be violated.

Such a result would impute to Congress "a self-defeating, if not a disingenuous purpose." *Nardone* v. *United States*, 308 U. S. 338, 341 (1940). Yet it would necessarily follow from the construction given to the statute by the Circuit

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4 We do not believe it is necessary to cite the literature—now very extensive—as to the moral, social and ethical attitude regarding "wire-tapping".

Court of Appeals. That Court recognized that "in form the language [of the statute] is indeed imperative" (fol. 43). We submit that it should have given effect to that imperative language rather than qualify it by reading into the statute a limitation which is not there expressed.

POINT II.

It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone conversations, in advance of trial at least as against defendants who were not parties to the communications.

As an alternative ground for its conclusion the Court below held that Section 605 does not prohibit the use of intercepted messages prior to the trial. The Court said:

> "It is precisely the use of evidence obtained by such divulgence that *Nardone* v. *U. S.*, *supra*, condemned, but the distinction between divulgence of the messages by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical" (fol. 45).

The Court below held that that distinction became important in the case of defendants who were not parties to the communications, and that as against such defendants the intercepted communications might be used prior to the trial to obtain other evidence, whatever the rule might be with respect to admissibility of the communications themselves at the trial.

This conclusion is plainly erroneous, as the Government itself concedes. The Government's brief in opposition to the petition for a writ of certiorari states "It is difficult to reconcile this view with the express terms of the statute prohibiting the use of such information" (p. 16, footnote).

Those "express terms" are contained in the fourth subsection of Section 605 which provides:

> "No person having received such intercepted communication or having become acquainted with the contents * * * thereof shall divulge or publish * * * or *use* the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." (Italics supplied.)

Obviously, the Court below completely overlooked this provision in holding that Section 605 does not expressly prevent use.

This error not only destroys the alternative ground given by the Court below for its conclusion, but it destroys the first and primary ground as well. For it was upon the supposed absence of any express prohibition against use that the Court relied in drawing its analogy between Section 605 and the Fourth Amendment. The Court recognized that the language of Section 605 was broader and more imperative than that of the Amendment, but it took refuge in the argument that at least as far as "use" was concerned, Section 605 was no more explicit than the Amendment and that, consequently, with respect to use the analogy was accurate. Since, as the Government has now conceded, the premise of this argument is false, it follows that the conclusion is erroneous. Inasmuch as Section 605, unlike the Fourth Amendment, explicitly prohibits use, there is no analogy between

the two provisions and, consequently, no reason whatever for applying to Section 605 the rule of construction which has been adopted by the lower Courts with respect to the Amendment.

POINT III.

The Trial Court did not afford the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications and was not based on independent sources.

The defendants had contended that the Government's entire case was permeated with wire-tapping from its very inception; that it was impossible at the late date of the preliminary hearing to sift the illegal from the legal strands of evidence.

The Circuit Court of Appeals held that the burden of proof in showing that the evidence did not stem from illegal sources was upon the Government (fol. 40). It declared the alleged restrictions placed upon the defendant in the preliminary hearing were immaterial because: "The prosecution was not shown to have carried the burden of proving how far the taps contributed to Messman's or Garrow's breakdown" (fol. 48).

The Government in its brief in opposition to the petition for certiorari admitted (p. 13) that the Government had the burden of proof but insisted that the Government had established that its proof had an origin independent of wire-tapping. It therefore again becomes material to discuss the sources.

The appellant contends first, that the proof in the lower Court failed to show the existence of any independent source, and second, that if there was evidence of any independent source, the appellant was not afforded a fair op-

portunity to prove that the so-called independent proof was "the fruit of the poisonous tree".

I. *The Prosecution Failed to Establish the Independent Sources.*

The alleged independent sources consisted of:

First: The evidence of Bernstein, with respect to his talks with Kipnis and Friedman, "room conversations" and telephone extension interceptions, examination insurance files and the unsigned confession of Kipnis.

In this connection it may be noted that Assistant United States Attorney Dailey testified Kipnis had been found "unworthy of belief" (R. 719), had made false charges against Mr. Dailey and Mr. Hardy (R. 719). Garrow said of him that he is a man "with a not imposing record" (R. 2818). Upon such a man's alleged confession, recorded after wire-tapping began, the major premise of the Government's independent source was based. Kipnis himself was not produced at the preliminary hearing or the trial. How his services were obtained in the first instance was never revealed.

Second: Inspector Shea's investigation between November 27, 1936 and the date of his report, December 6, 1936, based upon Bernstein's investigation, conversations with Kipnis and Friedman, examination of insurance company files and recorded conversations, both room and telephone extension interceptions. Shea's report was made "without any independent investigation" (fol. 37).

Shea, in testifying about his report, said that he referred therein only to "room conversations" (R. 292 *et seq.* 302). He knew that the telephone calls had been intercepted (R. 123) but confused them with room conversations (R 123, 124, 125).

The instrumentality used he considered "a dictaphone. That is not a telephone tap" (R. 131). He later admitted his error (R. 139).

It is of moment to note that continual difficulties arose in the hearing because of the confusion of Government witnesses in distinguishing between room conversations and telephone interceptions. Government witnesses assumed that the extension recordings were not wire-taps and refused to consider them as such in response to questions. *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2d 1940) *cert. denied* 311 U. S. 653, holding that extension wire-taps were illegal, was not decided until after this hearing.

Thus, the witness Bernstein said: "We never engaged in wire-tapping as you put it. If you are speaking of phone conversations taken off extensions, all right" (R. 233), and at another point said: "I don't know of any wire-tapping evidence that existed at that time" (R. 464)—referring to the time when he turned over the evidence to the Government.

Even the Assistant United States Attorney himself first took the position that the extension telephone recordings were not "wire-taps" (R. 203).

Therefore, Shea in preparing his report, considering the telephone extension interceptions as legal, classified all as room conversations (R. 295), but it is perfectly clear that the telephone extension interceptions formed a material part of his "investigation" (Shea's testimony, R. 122-3, 130, 157-8, 162, 164, 288-9; Dailey's testimony, R. 278-9, 291, 338, 621) and was included in the material given to him prior to his report (R. 225-6, 289).

Inspector Shea's report showed that he had reviewed these telephone conversations with other exhibits and recommended prosecution (R. 619).

Attempts were made to bolster the alleged independence of the sources by the testimony of Assistant United States Attorney Dailey. No matter how analyzed, the sources were the same—Shea's report, and ultimately, Bernstein's preparation which included illegal interceptions.

Dailey testified that, included in the evidence given to the Government was the illegal telephone extension interceptions (R. 621). Although the Government took the position it would not use such taps, Mr. Dailey read from the unsigned confession of Harry Kipnis (R. 623, Government's Exhibit 5). This Exhibit purports to involve Dr. Goldstein through conversations between Dr. Messman and Kipnis (R. 629, 650-55). Mr. Dailey read into the record, from this Exhibit, portions of Mr. Kipnis' daily report for September 14, 1936, which incorporated the same material as was contained in a telephone extension interception of September 14, 1936. In reading it, he omitted the telephone interception (R. 638-9). Similarly, when Dailey read a daily report of Kipnis (Deft's Ex. 11), it originally had a telephone interception attached, but Mr. Dailey read only the accompanying report (R. 664).

The legal and illegal strands of evidence were so thoroughly interwoven that a witness could no longer separate one from the other no matter how honest his endeavor.

Thus, in effect, the United States Attorney read into the record only such portions as indicated no wire-tapping, although telephone extension interceptions had simultaneously taken place. Where the leads and clues started and where they ended was impossible to ascertain.

As to the actual wire-taps themselves and the prior use made thereof, the Government disclaimed that any use whatsoever had been made of them for the purpose of preparing for trial. The Government contended that after the wire-taps had been accumulated in the *Garrow* case, nothing was

done with the taps because the prosecution was preoccupied with the *Weiss* case.

It is undisputed that Messman had heard the wire-taps obtained in the *Weiss* case which undoubtedly included phone calls he had made to both Weiss and Garrow, because he was a defendant and co-conspirator in both cases. Messman's Trial Brief contained evidence and testimony which he was going to reveal in both cases.

That the Government's contention is hardly plausible is made clear by a consideration of many master facts including the fact that some of the conspirators involved with the Garrows had been involved with Weiss, where there had been a clear use of wire-tapping; that Messman did see some of the wire-taps (R. 386); that some of the taps had been used by the Grand Jury in presenting the earlier indictment against Garrow (R. 368); that wire-tapping appeared to be legal at that time because the Circuit Court of Appeals had already affirmed the Weiss conviction, and the Government was preparing the *Garrow* case for trial (R. 355 *et seq.*); and that Weiss and Garrow had been named together in one indictment (R. 388), which was not prosecuted.

Despite all this, the Government insisted that in the *Garrow* case the information obtained by wire-tapping at the cost of thousands of dollars and with records and transcripts available, was completely disregarded and not used in any manner (R. 336).

2. *The Court Restricted the Defendants in the Preliminary Hearing.*

The defendants were not afforded a full and free opportunity to eliminate all possible doubt as to the existence of independent sources. We recognize that there must be limits placed upon the defendants' rights to pry into the

Government's case, but as Judge Learned Hand said in *United States* v. *Nardone*, 106 F. (2d) 41 (C. C. A. 2d 1939) at p. 44:

> "One thing leads to another and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure."

First: Appellant sought to cross-examine on the matter of leads and clues. From the very inception, the Court took the position that cross examination was not to be allowed (R. 126, 153, 175, 180, 348) even to refresh hostile witnesses' recollections because the Court did not consider the proceeding a trial (R. 153).

Second: The appellant contends that the Court erred in not permitting the defendants to see many documents. It became evident early in the hearing that the Court would not admit documents in evidence (R. 323-36, 333, 340, 370, 373); that defendants could inspect them only if they mentioned wire-taps in *haec verba* or if the Government consented to such inspection (Cf. R. 131-2, 136, 137-8, 150, 291, 309, 340). The Court itself examined exhibits for the purpose of determining whether or not wire-tapping appeared therein (Prel. Hrg. Exhibits—Shea's Report, not marked [R. 292-3], Deft's Exs. BB [R. 323], DD [R. 340], EE [R. 370], 1, 5 and 6).

An indication of the difficulties arising from such procedure is found in the Court's reading of Shea's report. The Court directed Shea's attention to certain paragraphs (R. 292, *et seq.*) which the witness stated were "room conversations". The Court after reading the report said it found no reference to telephone taps (R. 293). Then Mr. Dailey asked

Shea to reconsider a particular paragraph (R. 294). Shea finally admitted it referred to a wire-tap. The District Court in the *Weiss* opinion made no reference whatever to the telephone interceptions and discussed only the room conversations. Shea was not sure at the date of the hearing whether they might have been telephone extension interceptions (R. 302-3). If the Government found it difficult to disassociate wire-taps from the room conversations, an impossible task was imposed upon the defendants, without appropriate liberality in inquiry.

It is not claimed that the Judge improperly read the material but it is contended that in view of the Judge's unfamiliarity with the ramifications of the case, his reading could be of little assistance in determining whether any particular evidence had been obtained from a tainted source.

As long as the documents contained no express reference to wire-tapping the Judge was apparently satisfied. The defendants should have had an opportunity to see the so-called independent sources and to examine the particular evidence and trace its source. Without such privilege wires may be tapped indiscriminately and thereafter a report prepared embodying the facts learned but without reference to wire-tapping. Under the Court's ruling this would foreclose any further inquiry by the defendants.

Third: Witnesses were permitted to express opinions and conclusions over objection and attempts to find the basis for the statement or opinion were prevented by the Court.

When Bernstein was asked what information he had about the defendants prior to their arrest, the Court refused to strike Bernstein's answer when he said: "We had information concerning all of the defendants from sources having nothing to do with any telephone conversations" (R. 256). An attempt to limit Bernstein to stating evidence in his

possession rather than his conclusions, was prevented by the Court (R. 257).

Mr. Shea was permitted to testify: "I knew we had a complete mail fraud case and I went on other work" (R. 280). The Court refused to strike this and then refused various efforts on the part of the defendants to ascertain whether in that report Shea had named each individual defendant on trial (R. 301). The Court refused to permit an inquiry as to whether in the witness' opinion he had all of the testimony or evidence that was needed against the defendants (R. 306). The Court refused to permit the defendants to see the December 6, 1936 report of Shea (R. 307), which was claimed by the defendants to be based on wire-taps but which the Government contended was derived from an independent source. The importance of Mr. Shea's expression of opinion, without benefit of cross examination was indicated when the Court commented and said (R. 308):

> "It appears that Inspector Shea has been a post office inspector for twenty years. In that time he has given a great deal of attention to mail fraud cases. His opinion on the subject is very valuable, much more valuable naturally than would be the opinion of a person lacking that experience."

An attempt to probe into this was denied (R. 308). Mr. Shea's opinion, the Court said, in its decision, "is quite convincing". See *Weiss* v. *U. S.*, 34 Fed. Supp. 99, at 101 (S. D. N. Y. 1940).

Mr. Dailey, too, was permitted to state opinions freely (R. 626, 675, 753 *et seq.*, 757-60, 253). The defendants were not permitted to see the basis for Mr. Dailey's statements (R. 630-1). This included Exhibit 5, the confession of Harry Kippis from which the witness read (R. 623) and

the case histories which were furnished by Kipnis (Govt's Ex. 6).

No request was made to examine Government's Exhibit 5. This Exhibit appeared in the testimony incorporated by stipulation from the *Weiss* hearing (R. 424). We submit that from the Court's previously indicated attitude a request to examine the document would have been futile. The result was that Mr. Dailey's testimony had to be taken as given, leaving the defendants with no alternative but to receive the words of the hostile witnesses from the witness stand without an opportunity to see the supporting data.

The original wrong was in the tapping of the wires. No matter how difficult or burdensome it might have been to the prosecution, the original responsibility rested with it. The burden was one of its own creation. The defendants, therefore, should have had a full and ample opportunity to probe into the origin of the testimony alleged to be untainted.

POINT IV.

The Court's charge to the jury was prejudicial to the rights of the appellant.

The Court prefaced his charge with the conventional instructions given to a jury in a criminal case. The bulk of the charge, however, consisted of comments upon the evidence. We believe it fair to say that the charge, in substance, amounted to a summation for the Government.

The Court did not review the entire evidence. He summarized those items of evidence most damaging to the appellant, without referring to appellant's explanation of that evidence or to the testimony of other witnesses which served to corroborate the testimony of appellant. The very items chosen by the Court for comment served to emphasize the importance of those items in the minds of the jury.

The comment was phrased, for the most part, in the form of rhetorical questions, which were so worded as to admit of only one answer, an answer which was invariably injurious to the appellant. A few examples will illustrate the Court's method.

At the outset of his charge, the Court referred at length to the witnesses Messman and Garrow, one a confessed perjurer and the other the confessed instigator of the fraudulent scheme. The Court elaborated upon their "low moral character" (fol. 12) and referred to them as "crooks" (fol. 13). He then pointed out that the appellant had dealt with Messman and Garrow over a period of three years, during the course of which time they had brought various patients to the appellant in his capacity as consultant (fols. 24-25). The Court then remarked (fol. 25):

> "I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman?"

In making this observation the Court said nothing whatever about the fact that the appellant had denied any knowledge of the true characters of Garrow and Messman. He failed entirely to point out that the appellant, if his testimony were true, would obviously have had no opportunity

to appraise Garrow and Messman in the same light and under the same circumstances as were presented to the jury. He did not caution the jury to weigh the testimony of Garrow and Messman in the light of their character and background, as against the testimony of the appellant, in the light of his admittedly good reputation. He had limited his caution to a formal statement that care should be exercised in examining their testimony (fol. 13). In effect the Court suggested to the jury that they should find the appellant guilty merely because he had done business with persons who, years after the event, admitted their guilt upon the witness stand (fols. 25-26).

Another illustration is still more striking. This appellant had treated one Fradkin, who was not claimed to have been a fraudulent case. It was charged by the Government, however, that the appellant had falsely certified as to the date of his treatment of Fradkin. In his charge the Court dwelt at length upon Fradkin's testimony in this connection and stated specifically that it was "worthy of your attention" (fol. 29). After summarizing Fradkin's testimony, he remarked (fol. 31):

> "Now you will recall that it is in the Fradkin case that Goldstein's office records are missing. Does that tell you anything about knowledge on the part of the defendant Goldstein of a scheme in which Garrow and Messman concededly were engaged?"

The Court wholly failed to advert to the appellant's version of this incident. He failed to mention his denial that he had predated his records in the Fradkin case (R. 4000). With respect to the missing records, the Court failed to point out that the Government actually possessed and had put in evidence as Exhibit 216 a copy of the appellant's

office record in that case (R. 4000). He failed to point out that Fradkin himself had not testified definitely as to the date of his visit to the appellant, that he had been unable to state whether his first heart attack was in 1935 or 1936 because his "memory for the exact year would be difficult" (R. 3207), and that he had testified that his memory for dates was unreliable (R. 3207).

Most important of all, the Court failed to mention that the only direct testimony as to an alleged predating in this case came not from Fradkin but from Garrow, and that Garrow had testified that he had asked the appellant to predate the record during a conversation in October 1937, at which the appellant's secretary, Miss Lanzetta was present (R. 3111-12). He failed to mention that Garrow had sworn positively that he would "stake everything" on the fact that Miss Lanzetta was there (R. 3112-13). He omitted to point out that Miss Lanzetta corroborated the appellant's denial (R. 4256) and that it had been demonstrated by documentary records that Miss Lanzetta was not in fact employed by the appellant at the time and that because of illness she had been away from appellant's office for many months prior and subsequent to the date of the alleged conversation (R. 4256, 4286-87) and hence could not possibly have been present.

Another illustration is to be found in the Court's remarks (fols. 32-33) with respect to a certain letter (Deft's Ex. 232) written by appellant to defendant Rubin, in which appellant requested Rubin to call at appellant's office. The request was made by letter for the reason that Rubin had no telephone (R. 4355).

It was the Government's contention that the purpose of the appointment was to enable appellant improperly to administer digitalis to Rubin. It was appellant's contention that the purpose was merely to discuss with Rubin

whether he wished to consult another physician, one Dr. Wyckoff, and if so whether Rubin would be able to pay Dr. Wyckoff's fee (R. 4177, 4207, 4359).

The Court stated in his charge:

> "You might look at that letter for what it may or may not teach you. Do you see anything in that letter on the subject of a consultation with Dr. Wyckoff? You may ask yourselves whether had that been the object of the letter, wouldn't it have been perfectly simple to notify Rubin that an appointment with Dr. Wyckoff had been made at a certain date, and to say: if this is not agreeable, let me know? You may wish to ask yourselves whether it was necessary to have Rubin come to Goldstein's office in order to confer with him on his ability to raise money to pay Wyckoff, in view of Goldstein's testimony that in a great many, if not all, the cases Garrow paid the fees" (fol. 32).

In posing these questions to the jury the Court failed to point out that appellant had denied that he had administered digitalis to Rubin (R. 4207); and that Rubin also had denied it (R. 4353). The Court failed to mention the testimony to the effect that Rubin had discussed with appellant the possibility of obtaining an opinion from Dr. Wyckoff and that prior efforts to consult Dr. Wyckoff had been unsuccessful because of the latter's absence in Europe (R. 4360). In omitting reference to this testimony and in placing the entire emphasis upon the fact that this letter made no reference to Dr. Wyckoff, the Court gave the letter an importance wholly unjustified in the light of all the evidence.

Another illustration of the Court's method is found in its comments with respect to the question of whether or not

it was generally known in the medical profession that digitalis could affect an electrocardiogram (fol. 33). Appellant had testified that prior to the time of the indictments in this case there was controversy on that subject and that little was known about it (R. 4129-33). With the obvious purpose of contradicting this testimony the Court pointed to the fact that a printed hospital form contained a question, among others, as to whether the patient had received digitalis (R. 5153). In emphasizing this fact the Court failed to point out that there was nothing about this particular question that would indicate that digitalis could possibly have any bearing on the electrocardiogram and it was but one of many questions on the back of the form (R. 4135, *et seq.*).

The Court below held that this charge did not constitute prejudicial error, on the ground that the District Court gave the jury only oblique intimations as to his views of the appellant's guilt (fol. 46). The Court below also stated that in its experience, "juries are generally quite robust enough to form their own opinions" independently of any opinions expressed by the Court (fol. 47).

We believe that this observation is significant as indicating the frame of mind with which the Court below considered the charge. That point of view is in marked contrast to that of this Court in *Starr* v. *United States*, 153 U. S. 614 (1893), where it is stated, at page 626:

> "It is obvious that under any system of jury trials, the influence of the Trial Judge on the jury is necessarily and properly of great weight and that his lightest word or intimation is received with deference and may prove controlling. *Hicks* v. *United States*, 150 U. S. 442, 452."

It is true, of course, that the Court may comment upon the evidence. *Lovejoy* v. *United States*, 128 U. S. 171 (1888).

It is equally axiomatic, however, that in thus commenting the Court must not prejudice the defendant by a one-sided presentation of the facts.

> *Quercia* v. *U. S.*, 289 U. S. 466, 470 (1933);
> *Stokes* v. *U. S.*, 264 Fed. 18, 25 (C. C. A. 8th, 1920);
> *Weare* v. *U. S.*, 1 Fed. (2d) 617, 619 (C. C. A. 8th 1924).

As was said in the *Weare* case, *supra* (R. 619):

> "* * * it is not a fair jury trial when the Court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution."

Curiously enough, the Court below cites, as prior precedent for this type of charge, *Dillon* v. *United States*, 279 Fed. 639 (C. C. A. 2d, 1921), although recognizing that it was probably overruled in *United States* v. *Murdock*, 290 U. S. 389 (1933).

He also cites *United States* v. *Bob*, 106 Fed. (2d) 37 (C. C. A. 2d, 1939), *cert den.* 308 U. S. 589 (1940). In that case, however, the Court said, referring to the charge:

> "It did present also the defendant's claims, which consisted, in the main, of denials, though it indicated its own opinion of the nature of these denials."

We believe it clear that the charge in the case at bar was essentially one-sided, not only in what the Court said, but in what he left unsaid, and that the jury was given to believe that the Court was convinced of the appellant's guilt and that the Court disbelieved the appellant's explanation of the testimony against him. The intimations of guilt, however "oblique" were as effective as if they had been phrased

in direct and unequivocal language. As far as the jury was concerned, the Court might as well have directed a verdict of guilty. We believe that the Judge went far beyond the limitation to which a Judge should be permitted to go in "assisting" a jury to determine decisions entrusted to it by the Constitution. Upon this ground alone, apart from all other questions in this case, the judgment appealed from should be reversed.

CONCLUSION.

Wherefore, the appellant Goldstein prays that the judgment of conviction below be reversed and the indictment dismissed.

Respectfully submitted,

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